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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 581

LOREN R. GAJEWSKI AND MERVIN A. GAJEWSKI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A15) [1] is reported at 321 F. 2d 261.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1963. (Pet. A15–A16.) A petition for rehearing was denied on August 26, 1963 (Pet. A17), and on September 19, 1963, Mr. Justice White ex-

[1] The record filed in this Court consists of 14 volumes: Vol. I, entitled "Original File of Pleadings", consists of 306 pages and is referred to herein as "O.R."; Vols. II through XIII, which reflect the transcript of proceedings at the trial with pages numbered from 1 through 2393, is referred to herein as "R."; Vol. XIV, with pages numbered from 1 through 18, consists of the proceedings in the court below.

tended the time within which to file a petition for a writ of certiorari to October 25, 1963. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the District Court committed reversible error in not requiring the United States Attorney and the Deputy Clerk of the Court to be sworn as defense witnesses.

2. Whether petitioners are entitled to a new trial because the United States Attorney who tried the case for the government had represented them in an unrelated civil matter in 1952, although no objection was made in the District Court.

STATUTES INVOLVED

Title 18 of the United States Code provides:

> SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

SEC. 1001. STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

1. On October 24, 1960, petitioners were indicted in the United States District Court for the District of North Dakota. Count I alleged that both before and after June 22, 1954, petitioners had conspired together and with their father (Otto Gajewski, who died in 1959) to commit certain offenses in violation of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1281, *et seq.*) and of 18 U.S.C. 1001, the general "false statements" statute (O.R. 1–4). Count II alleged that petitioners had conspired to violate the Social Security Act (O.R. 5–6). Count III alleged that petitioners had conspired together and with their parents as co-conspirators, during a period beginning prior to March 1955, and continuing until 1960, to violate 18 U.S.C. 1001 by (1) filing income tax returns in the name of Otto Gajewski for the years 1952 through 1958 in which both petitioners were falsely claimed as dependents for each year; (2) filing such a return for the year 1951 in which petitioner Loren

was falsely claimed as a defendant; and (3) filing an income tax return in the name of Lillia Gajewski for 1959 in which both petitioners were falsely claimed as her dependents. The indictment alleged that it was a part of the conspiracy that petitioners would fail to file income tax returns on their own behalf for the years 1951 through 1958 (O.R. 7–9). Count IV alleged that petitioner Loren Gajewski had made false and fraudulent statements in his 1959 income tax return in violation of 18 U.S.C. 1001 (O.R. 10).

After a jury trial lasting three weeks (R. 2374) the petitioners were convicted on Counts I and III and acquitted on Count II. Loren Gajewski was also convicted on Count IV (O.R. 294–300; R. 2371–2373). Loren was sentenced to concurrent two-year prison terms on each of the three counts on which he was convicted (O.R. 301) and Mervin was sentenced to concurrent two-year terms on each of the two counts on which he was convicted (O.R. 302). Because of the concurrent sentences, the court of appeals found it necessary to consider only Count III in affirming the convictions.

2. The evidence to support the verdicts of guilty on Count III may be summarized as follows:

During the 1950's Otto and Lillia Gajewski owned a 465-acre farm in McKenzie County, North Dakota. Their son Loren owned a 400-acre adjoining farm. These 865 acres were known as the "home farm." (Govt. Exs. 46, 71; R. 169–172.) Between the years 1951 and 1957 petitioners Loren Gajewski and his brother, Mervin Gajewski, had a two-thirds interest in another farm, about six miles south of the "home

farm," consisting of 519 acres and referred to throughout the trial as the "south farm."[2]

Until May 1955 none of the Gajewskis had filed income tax returns for the years 1951 through 1953. On February 10, 1955, Loren appeared at the office of a revenue agent in response to a request that he produce records relating to the income tax liability of himself and his father. No records were produced at that time nor at their subsequent meeting on May 24, 1955. At the latter meeting, however, Loren presented income tax returns in the name of his father, Otto, for the years 1951 through 1953. Loren was listed as a dependent on the 1951 return and both petitioners were listed as dependents in the 1952 and 1953 returns, all of which had been prepared by Loren (Govt. Exs. 110, 111, 112; R. 836–841, 853–854). The agent again discussed the matter with Loren in March 1957, advising him that he and Mervin would have to file individual income tax returns in their own names, and giving Loren the blank forms for that purpose. Mervin never did so, however, and Loren filed no returns until 1960 (after the death of his father), when he filed a tax return for 1959 showing a loss of $1.00 (Govt. Ex. 119; R. 843–845, 872).

No member of the Gajewski family paid any income tax to the United States for the years 1951 through

[2] The "home farm" had been issued a farm marketing card by the United States Department of Agriculture and was in compliance with the wheat acreage allotment program (R. 171–174, 182–188). No farm marketing card had been obtained for the "south farm." Count I involved whether the petitioners had marketed wheat grown on the "south farm" under the marketing card issued for the "home farm."

1959 (Govt. Exs. 110–119, inclusive; R. 844–845, 865–873, 1879). All of the returns filed by the father, Otto (1951 through 1958), and those filed by Loren and his mother for 1959, showed no tax due, although the government's evidence showed that during the years 1955 through 1959 the net worth of the family increased by an average of more than $11,000 per year (Govt. Ex. 233; R. 1867) and resulted in a combined tax liability of more than $6,700 for the petitioners (Govt. Ex. 234; R. 1876–1877). Both petitioners were claimed as dependents on the returns filed in the name of Otto for the years 1952 through 1958, and Loren was so claimed on the 1951 return (R. 865–873), although it is plain that neither qualified for the deduction for dependents.[3]

ARGUMENT

The court below held that there was substantial evidence to support the convictions of both petitioners on each of the counts on which they were convicted, but pointed out that since the prison terms are concurrent it was unnecessary to go beyond a consideration of the propriety of the convictions on Count III.

[3] Neither petitioner qualified in any year as a deductible "dependent" for tax purposes (Sec. 25(b) of the Internal Revenue Code of 1939 and Sections 151–152 of the Internal Revenue Code of 1954) because each had annual income in excess of $600, was not receiving most of his support from his parents, was over 18 years of age, and was not attending school (R. 1885–1886, 2272).

It should be noted that petitioner Mervin Gajewski was invariably listed on Otto's tax returns as a dependent under the name of Arthur Gajewski (Govt. Ex. 72; R. 866–871, 873, 1839).

(Pet. A5, A10.) The evidence of guilt on that count was, as we have shown, ample. Athough petitioners' income during the years 1955 through 1959 was large enough to result in a combined tax liability of more than $6,700, they filed no income tax returns (until Loren's non-taxable return for 1959 was filed). They were falsely listed as dependents on the non-taxable returns of their parents throughout the 1950's. This continuous course of conduct could not have been followed by accident or chance but only as the result of a long-standing agreement among the petitioners and their parents. It was this corrupt agreement which constituted the conspiracy alleged in Count III and which was established "overwhelming[ly]" (Pet. A5) by the evidence.

The two principal questions raised in the petition are (1) whether the United States Attorney and the Deputy Clerk of the District Court should have been sworn as defense witnesses, and (2) whether it was proper for the United States Attorney to "personally prosecute his former clients" (Pet. 2).

1. There is no merit in the argument (Pet. 8–11) that the trial judge erred in not requiring the Deputy Clerk or the United States Attorney to testify. A defendant has no absolute right to call as a witness anyone he wishes, regardless of the relevance of the testimony sought to be adduced. *May* v. *United States*, 175 F. 2d 994, 1010 (C.A. D.C.); *United States* v. *Alu*, 246 F. 2d 29, 33–34 (C.A. 2); *Fisher* v. *United States*, 231 F. 2d 99, 104 (C.A. 9). In particular, whether the defense should be permitted to call the United States Attorney as a witness is a matter within

the discretion of the trial judge. *United States* v. *Alu, supra,* pp. 33–34; *Fisher* v. *United States, supra,* p. 104.

In the present case, there was exceptional reason for the trial judge to inquire as to the relevance of the testimony to be elicited. Just before attempting to call the Deputy Clerk and the United States Attorney, Mervin Gajewski had examined his first witness, one Conitz, who identified himself as the President of the Farmers' Liberty League, a group which, said Conitz, was "organized to expose and oppose communism in agriculture and otherwise." (R. 2207) [*] The exchange between Mervin and Conitz consisted of a large number of questions as to patently irrelevant matters—objections to which were sustained—and some testimony by Conitz as to almost equally irrelevant matters regarding *his own* activities in farming and his association with the Farmers' Liberty League (R. 2197–2210). Judge Graven then excused the jury and asked Mervin what he proposed to prove by the testimony of Conitz. Mervin replied that he intended to show that the entire program of federal controls on agriculture was promulgated by communists and socialists in order to "completely socialize our free American agriculture * * *" (R. 2210–2211). The court then

[*] Before the trial Mervin Gajewski filed a "Motion to Challenge Jury List," alleging that certain members of the petit jury panel were in favor of the "communistic" Agricultural Adjustment Act (O.R. 110). Throughout the trial Mervin's principal contention was that he could not properly be convicted of the crime alleged in Count I because the Agricultural Adjustment Act is communistic and unconstitutional.

excused the witness on the ground that such testimony would be immaterial and irrelevant (R. 2211).

At this point Mervin called the Deputy Clerk to testify as to two civil actions involving Mervin's difficulties with the Department of Agriculture, because "there are certain interrogatories involved and we must have them."[5] This request was properly refused on the ground that such evidence was immaterial and irrelevant and the point was not pressed (R. 2212–2213). Mervin then called United States Attorney Garaas as witness and there ensued the colloquy set forth in the petition (pp. A18–A21). Since nothing in the colloquy explained the necessity for such an unusual step as requiring the government prosecutor to testify, denial of the request was properly within the discretion of the district court.

Finally, it seems rather clear that whatever Mervin hoped to established by these two witnesses would, at best, have gone only to Count I and could have had no bearing on Count III. There is even now no semblance of a showing that the testimony sought would bear in any way on the conspiracy to make false statements on Otto Gajewski's income tax returns.

2. Petitioners' argument (Pet. 11–12) that the United States Attorney should not have tried the case because he had obtained confidential information from them at some time in the past is also without merit.

[5] One of the suits appears to have been an action brought by Mervin against the County Review Committee for a judicial review of his 1961 wheat acreage allotment. *Gajewski* v. *The Review Committee of the Secretary of Agriculture*, etc., 321 F. 2d 543 (C.A. 8).

Petitioners did not contend, at any stage of the trial, that Mr. Garaas should be disqualified because (1) his former representation of them had resulted in his obtaining confidential information and (2) this information might have an adverse effect on the petitioners if used at the trial. *Consolidated Theatres* v. *Warner Bros. Cir. Man. Corp.*, 216 F. 2d 920, 925 (C.A. 2); *Marco* v. *Dulles*, 169 F. Supp. 622, 629 (S.D.N.Y.), appeal dismissed, 268 F. 2d 192 (C.A. 2); *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 354 (S.D.N.Y.). Although a motion to disqualify an attorney must be made with reasonable diligence,[6] no such contentions were made in the district court nor even in the court of appeals until petitioners filed their "Supplemental Brief" (Pet. A10–A11). Moreover, it appears affirmatively that, if such contentions had been timely urged, the government could have shown that there was no relationship between Mr. Garaas' representation of petitioners in 1952 and the charges contained in the instant indictment.[7] Finally, assuming *arguendo* that petitioners had shown the receipt of confidential information by Mr. Garaas in connection

[6] *Marco* v. *Dulles*, 169 F. Supp. 622, 632 (S.D.N.Y.), appeal dismissed, 268 F. 2d 192 (C.A. 2); Annotation at 52 ALR 2d 1243, 1268 and authorities cited. Compare *Johnson* v. *United States*, 318 U.S. 189, 200–201.

[7] We agree with petitioners that the statement by the court below that Mr. Garaas had represented petitioners on only one occasion, a 1952 lawsuit involving cancellation of oil leases on petitioners' land (Pet. A11), is not supported in the record on appeal (Pet. 6). There was no occasion at the trial to make this fact a matter of record for there was no contention there that Mr. Garaas should not have tried the case. The court below accepted as a fact this representation which Mr. Garaas made in his brief in that court.

with the cancellation of the oil leases, it seems hardly conceivable that any such information could bear on the matter of the false income tax returns which were the subject of Count III.[8]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1963.

[8] There is no need to discuss the contention (Pet. 13–15) that confidential records were improperly used in evidence against petitioners, for it is crystal clear that such records went only to Count I, and the sentences on Counts I and IV are ordered to run concurrently with that imposed on Count III. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Barenblatt* v. *United States*, 360 U.S. 109, 115 and cases cited.

U.S. GOVERNMENT PRINTING OFFICE: 1963